

Judicial Elections and Judicial Independence: The Voter's Perspective

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The relationship between judicial elections and judicial independence is receiving considerable scrutiny today. This article examines the impact of elections on judicial independence from the perspective of voters, since it is voters' choices that ultimately determine the electoral fates of incumbent judges. The research on voting in judicial elections helps in understanding the circumstances that make judges vulnerable to defeat and the conditions under which elections may reduce judicial independence. This research also illuminates the effects of different forms of election—partisan, nonpartisan, and retention—on incumbent judges.

I. INTRODUCTION

Judicial independence is a subject of great interest today, and much of that interest concerns its connection with judicial elections. There is a widespread perception of growth in the frequency of strong challenges to incumbent judges that are based on the substance of judges' decisions.¹ In turn, this perceived growth suggests that the election of judges reduces judicial independence in substantial ways.

Judicial independence raises important normative questions concerning the balance between independence and accountability.² In this article I leave those questions aside and focus instead on empirical issues concerning the relationship between judicial elections and judicial independence. Most of the attention given

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¹ See, e.g., DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS* (2002), available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf> (last visited Dec. 12, 2002); William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1; Tom R. Phillips, *When Money Talks, the Judiciary Must Balk*, WASH. POST, Apr. 14, 2002, at B2. As I will discuss, this perception almost surely is accurate. Yet issue-based campaigns against incumbents are hardly new. See, e.g., Jack Ladinsky & Allan Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 129–30; *Champion of Integration Loses in L.A.*, S.F. CHRON., Nov. 5, 1970, at 5 (California Superior Court); Steven Wittels, *Running for Judge*, AM. LAW., Sept. 1982, at 32, 32–33 (California Superior Court).

² These topics are discussed in other articles in this issue. See also PETER H. RUSSELL & DAVID M. O'BRIEN, *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* (2001). An extensive annotated bibliography is found in Amy B. Atchison et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999).

to this relationship focuses on campaigns for judicial office, with particular attention to the issues that candidates raise and the levels and sources of campaign funding. But ultimately it is voters who determine the outcomes of contests for judgeships and thus the impact of elections on judicial independence.

There are large gaps in our understanding of voting in judicial elections. Over the years, however, scholars have done considerable research on patterns of voting and outcomes in judicial elections. The debates and analyses concerning the relationship between elections and judicial independence have incorporated that research only to a limited degree.³ This article is intended to bring that body of knowledge into those debates.⁴

The second section of the article briefly addresses some preliminary issues. The third section surveys what we know about the behavior of voters in judicial elections. The fourth section examines the circumstances under which incumbents are defeated in elections. The fifth section draws out the implications of the empirical evidence for issues concerning judicial independence.

II. PRELIMINARY ISSUES

Judicial independence has been defined in a variety of ways.⁵ For purposes of this article, full judicial independence is defined as a condition in which judges are entirely free from negative consequences for their decisions on the bench. The degree of judicial independence is the degree of such freedom.

Negative consequences for decisions might take many forms. The most obvious, and the focus of this article, is loss of position. In practice, judges' fears

³ This situation reflects the limited communication between scholars in law and those in the social sciences, which results in what Professor Frank Cross has called "unfortunate interdisciplinary ignorance." Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 251 (1997); see also Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 511-12 (1998). Specifically, empirical research on judicial elections is done primarily by political scientists; legal scholars and others in the legal community do not generally consult political science journals.

⁴ I draw evidence in part from a series of surveys of Ohio voters in state supreme court contests over the past two decades. Surveys of voters in contests for offices other than the highest ones are relatively rare, so this set of surveys has added substantially to the body of knowledge on judicial voting. The Ohio surveys and some of the difficulties involved in surveys of judicial voters are discussed in Lawrence Baum, *Electing Judges*, in CONTEMPLATING COURTS 18, 31 (Lee Epstein ed., 1995).

⁵ For a discussion of different aspects of judicial independence, see Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 706-12 (1995). See also JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002).

of losing their positions may be exaggerated, as is often the case for legislators.⁶ Such exaggerated fears can have a direct impact on judges' behavior, but my primary concern is the actual vulnerability of judges to defeat rather than judges' perceptions of their vulnerability.

Elections, of course, are not the only potential source of limits on judicial independence. For one thing, loss of position is not the only significant consequence that judges may suffer for their decisions. Life-tenured federal judges have been subjected to severe personal criticism and even threats of violence as a result of their decisions, as some district judges were during the battles over civil rights in the Deep South.⁷

Further, judges who do not face elections can still lose their positions as a result of their decisions. State judges have been denied reappointment by the governor because of their decisions, although the reasons for the denial are not always clear. Some observers perceived that Delaware's governor denied a new term to a supreme court justice in 1994 because the justice had taken positions favorable to stockholders in conflicts with corporate management.⁸ In 1997, New York Governor George Pataki reportedly decided not to reappoint an appellate judge on the ground that the judge had shown excessive liberalism in criminal cases.⁹

Even a life term does not guarantee continued tenure. In 2000, Chief Justice David Brock of the New Hampshire Supreme Court was impeached (though not convicted) for alleged misdeeds concerning court procedures.¹⁰ Those allegations probably would not have resulted in legislative action had it not been for widespread unhappiness about the state supreme court's decisions concerning

⁶ See THOMAS E. MANN, *UNSAFE AT ANY MARGIN: INTERPRETING CONGRESSIONAL ELECTIONS* 3 (1978); GLENN R. PARKER, *HOMEWARD BOUND: EXPLAINING CHANGES IN CONGRESSIONAL BEHAVIOR* 22 (1986).

⁷ See generally J.W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1961); TINSLEY E. YARBROUGH, *A PASSION FOR JUSTICE: J. WATIES WARING AND CIVIL RIGHTS* 98-106 (1987); TINSLEY E. YARBROUGH, *JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA* 47-61 (1981).

⁸ The justice, Andrew Moore, was left off of a one-person "list" of nominees presented to the Governor by a nominating commission, and the Governor appointed that nominee. See Karen Donovan, *Shareholders' Advocates Protest Justice's Removal*, NAT'L L.J., June 6, 1994, at B1; Diana B. Henriques, *Top Business Court Under Fire*, N.Y. TIMES, May 23, 1995, at D1; Richard B. Schmitt, *Delaware Governor Picks Trial Judge for Supreme Court*, WALL ST. J., May 26, 1994, at B7.

⁹ Jan Hoffman, *A Prominent Judge Retires, Objecting to the Governor's Litmus Test*, N.Y. TIMES, Dec. 14, 1997, § 1 (Metro), at 49.

¹⁰ See Ralph Ranalli, *N.H. Senate Acquits State's Chief Justice*, BOSTON GLOBE, Oct. 11, 2000, at A1; Ralph Ranalli, *Personality Seen Factor in N.H. Drama*, BOSTON GLOBE, July 12, 2000, at B1; Jeffrey Toobin, *The Judge Hunter*, NEW YORKER, June 12, 2000, at 49, 49-54.

school funding. The court had declared that the state's funding system was unconstitutional¹¹ and then disapproved some proposed changes in the system.¹²

No federal judge has been removed because of the substance of the judge's decisions,¹³ but in recent years some have been threatened with impeachment for that reason. In the mid-1990s, House Majority Whip Tom DeLay talked of seeking to impeach some federal judges whom he regarded as excessively liberal.¹⁴ New York district judge Harold Baer was strongly attacked for his decision and opinion throwing out evidence in a 1996 drug case. Republicans in Congress advocated his impeachment, and President Clinton's press secretary suggested that the President might ask his appointee Baer to resign. Under this pressure, Judge Baer reversed his decision.¹⁵

Still, the attention given to the impact of elections on judicial independence is justified. The great majority of judges in the United States must periodically win elections in order to retain their positions,¹⁶ and significant numbers of incumbent judges are defeated. Changes in campaign practices almost surely have increased the number of judges who face opposition based on the content of their decisions. Whether or not the proportion of judges who are actually

¹¹ *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1354 (N.H. 1997).

¹² *Claremont Sch. Dist. v. Governor*, 744 A.2d 1107, 1108-09 (N.H. 1999).

¹³ See MARY VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE 1-20 (1993). However, the impeachment of Supreme Court Justice Samuel Chase in 1804 was largely a result of President Jefferson's unhappiness with Chase's decisions. Chase's impeachment and acquittal are discussed in WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 15-119 (1992).

¹⁴ Bruce Fein, *Judge Not*, N.Y. TIMES, May 8, 1997, at A31.

¹⁵ Don Van Natta Jr., *A Publicized Drug Courier Pleads Guilty to 3 Felonies*, N.Y. TIMES, June 22, 1996, at A23. The decisions were *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996) and *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996).

The unsuccessful campaign to impeach Supreme Court Justice William O. Douglas in 1969 and 1970 was spurred in part by conservative unhappiness with Douglas's decisional record. JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 391-411 (1980). The same was true of the drive to impeach Justice Abe Fortas in 1969, though Fortas was charged with more serious improprieties than Douglas was. Fortas actually might have been impeached and convicted had he not resigned from the Supreme Court. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 359-78 (1990).

¹⁶ Justices on the highest appellate courts of thirty-eight states and judges on the trial courts of general jurisdiction in thirty-nine states face elections. These figures were calculated from data in AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2000). According to one scholar's calculation, 87% of state judges "stand for some form of election." Roy Schotland, *Judicial Campaign Finance Could Work*, NAT'L L.J., Nov. 23, 1998, at A21.

defeated has increased,¹⁷ the growth in issue-based campaigns against incumbents probably has increased the proportion who are defeated on the basis of their decisions. If so, the independence of elected judges, by my definition, has declined.

Among the states that elect judges, the ballot takes three general forms, each used by several states.¹⁸ In some states, candidates' party affiliations are listed on the general election ballot. In those states, candidates typically are nominated in partisan primary elections. In other states, candidates' partisan affiliations are not listed on the general election ballot. Nominations usually are made in nonpartisan primary elections, which become the final elections if a candidate receives a majority of the votes. In retention elections, voters are asked to cast positive or negative votes on sitting judges, with a simple majority of positive votes usually required for retention.¹⁹

These three ballot forms largely correspond to three election systems—respectively, partisan election, nonpartisan election, and the Missouri Plan (or merit selection). But the correspondence is imperfect because some states meld features of different systems. Ohio, for instance, utilizes partisan primary elections and nonpartisan general elections.²⁰ California initially chooses

¹⁷ Because we lack comprehensive data on the outcomes of judicial elections, it is uncertain whether the rate of defeat has increased over the past quarter-century. However, two studies suggest that such an increase has not occurred. One study of all elections to state supreme courts between 1980 and 1994 showed no clear trend toward higher rates of defeat during that period. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001). A study of retention elections in ten states between 1964 and 1994 showed no trend toward an increasing number of defeats. Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 9–10 (2000). It is possible that the rate of defeat has increased in the years since the 1994 ending point of these studies, a period in which strong challenges to incumbent judges seem to have grown. See Glaberson, *supra* note 1; cf. GOLDBERG ET AL., *supra* note 1 (describing the recent trend of interest group activity in state judicial elections).

¹⁸ For their highest appellate court, five states use partisan elections for incumbent judges, fourteen use nonpartisan elections, and nineteen use retention elections. For their general jurisdiction courts, nine states use partisan elections, twenty-two states use nonpartisan elections, and thirteen use retention elections. These figures add up to more than the total number of states that elect judges to general jurisdiction courts, provided *supra* note 16, because four states use different systems for different general jurisdiction courts. Mixed and ambiguous procedures were classified according to the system that they most closely approximate. State procedures were classified on the basis of information in AMERICAN JUDICATURE SOCIETY, *supra* note 16.

¹⁹ Illinois is the exception, requiring a 60% positive vote for retention. ILL. CONST. art. 6, § 12(d) (1993). The impact of that difference is discussed in the text herein. See *infra* text accompanying note 66.

²⁰ OHIO REV. CODE ANN. §§ 3505.04, 3513.13 (Anderson 1995).

appellate judges through gubernatorial appointment but requires appointees to undergo periodic retention elections.²¹ Illinois combines initial selection through partisan elections with retention elections for sitting judges.²²

Mixed systems aside, the extent and form of differences in actual practice among the three election systems are not necessarily as substantial as their formal rules would suggest. Judicial selection methods that appear to be fundamentally different may operate similarly in important respects.²³ One issue to be considered in this article is the actual differences among partisan election, nonpartisan election, and the Missouri Plan, including their implications for judicial independence.

III. THE JUDICIAL VOTER

One useful way to think about voters is that they are people who process information in light of their attitudes and beliefs in order to reach decisions.²⁴ This perspective underlines the importance of the information that candidates' campaigns and the mass media provide to prospective voters. It also emphasizes that the voters do not receive information as blank slates; rather, they evaluate from their own perspectives the information they receive.

Research on voting behavior concentrates overwhelmingly on contests for high-level offices and primarily on presidential elections.²⁵ This focus is understandable, but it distorts our picture of voters' decisions. Presidential elections are unique in the volume of information about the candidates that voters

²¹ CAL. CONST. art. 6, § 16(d) (1996).

²² ILL. CONST. art. 6, § 12(a),(d) (1993).

²³ One important similarity across the three elective systems is that each gives considerable power to the chief executive. The Missouri Plan allows the governor to select a judge from the nominees, and the governor's power to choose some members of the nominating commission provides another source of influence. See Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 334 (1990); Editorial, *Mr. Pataki Picks a Judge*, N.Y. TIMES, Dec. 4, 1996, at A28. In states that use partisan or nonpartisan elections, typically a substantial proportion of judges reach the bench initially through a governor's interim appointment. The proportion was about one-half in a study of eleven states. John Gibeaut, *Bench Battle*, A.B.A. J. Aug. 2000, at 42, 43. Of course, this characteristic of the three elective systems also reduces the differences between them and the system of gubernatorial appointment.

²⁴ See INFORMATION AND DEMOCRATIC PROCESSES (John A. Ferejohn & James H. Kuklinski eds., 1990) (discussing the role of information in elections and more generally in political decisionmaking).

²⁵ See generally CLASSICS IN VOTING BEHAVIOR (Richard G. Niemi & Herbert F. Weisberg eds., 1993); CONTROVERSIES IN VOTING BEHAVIOR (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001).

possess when they go to the polls.²⁶ The task for many voters is one of sorting out the information they have assimilated in order to reach a judgment about how to vote. For this reason, presidential election contests can be characterized as "high-information."

The preponderance of electoral contests in this country are fundamentally different from presidential elections in that voters have little information about the choices they face. In the great majority of contests, a large share of the voters go to their polling place without having assimilated much (or any) information about these contests. Indeed, many voters are not aware that these contests exist until they see the ballot. Ordinarily, contests for judgeships fall firmly in this "low-information" category.²⁷

Low-information contests are usually on the same ballot as more visible contests in which voters have been supplied with more substantial information.²⁸ It is predominately those high-information contests that attract voters to the polls. After casting their votes for offices such as president or U.S. senator, voters are then confronted with a set of low-information contests.

In the typical contest between two candidates, the voter has three options: a vote for the first candidate, a vote for the second candidate, or abstention. The choice in retention elections is similar: a yes vote, a no vote, or abstention. Voters who feel that they have no basis for a choice between the candidates are likely to abstain. Such abstentions are common, producing "rolloff" from high levels of participation in the contests at the top of the ballot to substantially lower levels in other contests.²⁹ Rolloff is an enduring reality in judicial elections. From 1980 through 1995, an average of about one-quarter of all people who went to the polls skipped a given contest for a supreme court seat. Rolloff was somewhat lower in

²⁶ Differences among offices in the information available to the voters are analyzed in Lawrence Baum, *Information and Party Voting in "Semipartisan" Judicial Elections*, 9 POL. BEHAV. 62 (1987); Barbara Hinckley et al., *Information and the Vote: A Comparative Election Study*, 2 AM. POL. Q. 131 (1974); Stephen D. Shaffer, *Voting in Four Elective Offices: A Comparative Analysis*, 10 AM. POL. Q. 5 (1982).

²⁷ Gary C. Byrne & J. Kristian Pueschel, *But Who Should I Vote for for County Coroner?*, 36 J. POL. 778 (1974); John E. Mueller, *Choosing Among 133 Candidates*, 34 PUB. OPINION Q. 395 (1970); Masao Nakanishi et al., *Voting for a Political Candidate Under Conditions of Minimal Information*, 1 J. CONSUMER RES. 36 (1974).

²⁸ Wisconsin, which has separate election dates for nonpartisan offices (including judgeships), is an exception. See WIS. STAT. ANN. § 5.58 (West 1996).

²⁹ R. Darcy & Anne Schneider, *Confusing Ballots, Roll-Off, and the Black Vote*, 42 W. POL. Q. 347 (1989); John T. Pothier, *Drop-Off, the Vanishing Voters in On-Year Elections, and the Incumbency Advantage*, 15 AM. POL. Q. 123 (1987); Jack L. Walker, *Ballot Forms and Voter Fatigue: An Analysis of the Office Block and Party Column Ballots*, 10 MIDWEST J. POL. SCI. 448 (1966); Martin P. Wattenberg et al., *How Voting Is Like Taking an SAT Test: An Analysis of American Voter Rolloff*, 28 AM. POL. Q. 234 (2000).

partisan elections (an average of 22%) than in nonpartisan elections (29%) and retention elections (28%).³⁰ As we would expect, rolloff is even higher in contests for lower-level judgeships. For instance, for all retention elections in ten states between 1964 and 1994, rolloff averaged 34.5%.³¹

Despite these high levels of rolloff, voters as a group appear to have a bias in favor of casting votes. Even a modicum of information about the candidates may be sufficient for a voter to choose one of them.³² Thus the subset of voters who participate in a judicial contest may include a great many who possess little information about the candidates in that contest.

Indeed, surveys often show that high proportions of voters cannot recall the names of judicial candidates around the time of the election.³³ Recollection of candidates' names is a difficult cognitive test (compared with recognizing those names when presented with them), and the results of such tests surely underestimate voters' information levels. However, surveys in Ohio Supreme Court contests have found that substantial proportions of the people who vote in those contests do not *recognize* the candidates' names, and many of those who do recognize those names have insufficient information to rate the candidates.³⁴

³⁰ Melinda Gann Hall, *Ballot Roll-Off in Judicial Elections: Contextual and Institutional Influences on Voter Participation in the American States*, at 18 tbl.1, Sept. 2, 1999 (paper presented at the annual meeting of the American Political Science Association in Atlanta, Sept. 2-5, 1999) (on file with author). Turnout and rolloff in supreme court elections from 1948 through 1974 are discussed in Philip L. Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite*, 41 J. POL. 865 (1979).

³¹ Aspin et al., *supra* note 17, at 12.

³² The ballot itself may strengthen the impulse to participate. One example is the ballot on an electronic voting machine on which a light flashes above each contest if the voter has not yet chosen a candidate in that contest. A study in Franklin County (Columbus), Ohio compared wards in which these machines were used with wards in which more traditional voting machines were used. In contests for judgeships, even more than in other contests on average, the flashing light induced voters to make choices. (One reason for the stronger effect in judicial contests undoubtedly was the lack of party labels on the ballot for judicial candidates.) The difference in voting rates between polling places with flashing lights and those without them averaged twelve percentage points for supreme court contests, sixteen percentage points for the court of appeals, and fifteen percentage points for the trial court of general jurisdiction. Stephen M. Nichols & Gregory A. Strizek, *Electronic Voting Machines and Ballot Roll-Off*, 23 AM. POL. Q. 300, 308 (1995).

³³ See, e.g., *How Much Do Voters Know or Care About Judicial Candidates?*, 38 JUDICATURE 141, 141-43 (1955) (parts of New York State, 1954); Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371, 374-75 (1978) (Lubbock, Texas, 1974).

³⁴ Lawrence Baum, *Voters' Information in Judicial Contests: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L.J. 645, 664-65 (1988-89); Baum, *supra* note 4, at 31; see also

In a low-information contest, the ballot itself is the primary source of information about the candidates.³⁵ Of course, it informs voters of the candidates' names. Several states provide the candidates' party affiliations in general elections; this, of course, is the definition of partisan elections.³⁶ A few states identify the incumbent, if one is running,³⁷ and Kansas and West Virginia provide the candidates' cities or counties of residence.³⁸

Names on the ballot can trigger evaluations of candidates. Sometimes these evaluations are based on pre-existing impressions. A voter may have forgotten that a particular pair of candidates was running for a judgeship; perhaps the voter

Anthony Champagne & Greg Thielemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271 (1991) (discussing voters' knowledge of the office held by named judges).

³⁵ The structure of the ballot itself can also influence voters' choices. Features such as the option to cast a single "straight-ticket" vote for all candidates of the same party encourage party-line voting. See Philip Loring Allen, *Ballot Laws and Their Workings*, 21 POL. SCI. Q. 38, 44-49 (1906); Jerrold G. Rusk, *The Effect of the Australian Ballot Reform in Split-Ticket Voting: 1876-1908*, 64 AM. POL. SCI. REV. 1220 (1970). Further, the order of candidates' names on the ballot can influence voters in low-information contests, with the first-listed candidate generally gaining an advantage. See D. Brook & G. J. G. Upton, *Biases in Local Government Elections Due to Position on the Ballot Paper*, 23 APPLIED STAT. 414 (1974); Joanne M. Miller & Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 PUB. OPINION Q. 291, 315-20 (1998). But see R. Darcy, *Positions Effects in Multimember Districts: The New Hampshire House of Representatives, 1972-1994*, 30 POLITY 691, 703 (1998) (arguing that first position on the ballot does not lead to electoral advantage). One commentary noted that in the hard-fought contests for seats on the Mississippi Supreme Court in 2000, the candidate listed first on the ballot won in each contest, and it suggested that this fact explained the results. See generally Michael P. Mills & Lee Waddle, *Judicial Independence in Mississippi*, 20 QUINNIPIAC L. REV. 709, 727 (2001).

³⁶ In supreme court contests involving incumbents, five states indicate the candidates' party affiliations; in contests for the court of general jurisdiction, nine states provide this information. See *supra* note 18.

The discussion of voting in partisan elections in this article is limited to general elections, the main locus of serious challenges to incumbent judges. Because of the absence of partisan affiliations on the ballot, partisan primaries resemble nonpartisan elections in the structure of the choice that voters face. In states that use nonpartisan elections, primary and general election ballots offer the same information to voters; the biggest difference between the two stages is that a primary ballot can include more than two candidates. Retention elections involve only one stage of decision, typically coinciding with the general election for other offices.

³⁷ Designation of incumbency is indicated by statutory mandate in California, Georgia, and Oregon. CAL. ELEC. CODE § 13107(2) (West 2002); GA. CODE ANN. § 21-2-285 (1998); OR. REV. STAT. § 254.125(2)(b) (1998). There may be other states in which incumbency information is not mandated by statute but nonetheless is included on the ballot. California allows all candidates to designate their "principal professions, vocations, or occupations" in "no more than three words"; incumbents may choose this option rather than labeling themselves as incumbents. CAL. ELEC. CODE § 13107(3) (West 2002).

³⁸ KAN. STAT. ANN. § 25-613 (1993); W. VA. CODE ANN. § 3-5-13(d)(2) (Michie 1999).

was never aware of their candidacies. Once informed of their identities, however, the voter may call to mind impressions of one or both candidates. If these impressions are based on meaningful information, the voter's belated choice may be well-informed—and this may be true even if the voter cannot recall the information on which these pre-existing impressions are based.³⁹

Of course, pre-existing impressions are not necessarily based on meaningful information. When campaigns and the media provide little information to voters, it is especially likely that such impressions are based on a shallow pool of information. Moreover, candidates' names can create new impressions that have no basis in prior information about the candidates. For instance, one candidate's name may have a vaguely positive or negative connotation for a voter. In Texas, one candidate for the state Supreme Court with dubious qualifications was elected on the basis of a surname that was similar to the names of two well-known politicians, while another candidate named Gene Kelly won a supreme court primary as an underdog.⁴⁰

A name supplies other information to voters, indicating (albeit imperfectly) the candidate's ethnicity and gender. For voters who are positively or negatively inclined toward women as public officials, to take one example, this information may be quite relevant to their choices.⁴¹ Studies of judicial elections have found

³⁹ See Milton Lodge, *Toward a Procedural Model of Candidate Evaluation*, in POLITICAL JUDGMENT: STRUCTURE AND PROCESS 111 (Milton Lodge & Kathleen M. McGraw eds., 1995); Milton Lodge et al., *An Impression-Driven Model of Candidate Evaluation*, 83 AM. POL. SCI. REV. 399, 411–17 (1989); Milton Lodge et al., *The Responsive Voter: Campaign Information and the Dynamics of Candidate Evaluation*, 89 AM. POL. SCI. REV. 309, 321–22 (1995).

Thus, we should not infer too much from the reasons that voters provide (or fail to provide) for their choices. Voters who are asked the reasons for their votes in Ohio Supreme Court contests typically do not supply reasons that reflect substantial information. Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 303–08 (1992). In all likelihood, the great majority of voters who could not provide substantial reasons never assimilated much information about the candidates. But some of those voters undoubtedly formed meaningful impressions of the candidates on the basis of information that they had forgotten by the time of a post-election survey about their votes.

⁴⁰ Champagne & Thielemann, *supra* note 34, at 271; see also PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 82, 89 (1980) (discussing the effects of familiar names in Ohio and Arizona); Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 926–27 (2002) (discussing the role of names in Texas judicial politics).

⁴¹ See Kira Sanbonmatsu, *Gender Stereotypes and Vote Choice*, 46 AM. J. POL. SCI. 20, 22–23 (2002). Identification of a candidate as a woman may also trigger impressions of other attributes, including the candidate's ideological position (with women believed to be relatively liberal). Jeffrey W. Koch, *Gender Stereotypes and Citizens' Impressions of House Candidates' Ideological Orientations*, 46 AM. J. POL. SCI. 453, 453–54 (2002).

that candidates' gender affects their overall share of the vote⁴² and that individual voters may base their choice heavily on gender.⁴³ Politicians and candidates themselves widely believe that voters react to a candidate's ethnicity.⁴⁴

In many states, the ballot provides no information on judicial candidates other than their names.⁴⁵ Where it does provide additional information, that information can play into voters' decisions in significant ways. Identification of the candidates' places of residence might trigger "friends and neighbors" voting, in which candidates do best in areas near their homes.⁴⁶ The one study that investigated this possibility found that the triggering effect did not occur,⁴⁷ but this finding should not be taken as definitive.

Certainly, identification of a candidate as the incumbent may be highly salient to voters. One study indicated that California voters reacted favorably to an indication of judicial experience.⁴⁸ Incumbency in itself serves as a positive or negative cue for some voters. Survey-based experimental studies of the impact of

⁴² Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC'Y REV. 395, 419 (1984).

⁴³ Baum, *supra* note 4, at 34–35.

⁴⁴ For instance, Irish ancestry is thought to be an advantage in Chicago. This belief was illustrated by the decision of a 1998 judicial candidate to adopt a middle name, so that she appeared on the ballot as Bonnie Fitzgerald McGrath. Michael Miner, *The Game of the Name*, CHI. READER, Feb. 27, 1998, § 1, at 4.

⁴⁵ This is the most common ballot form in nonpartisan contests, widely used for elections to local offices and used for some state offices in the United States. See Gerald Pomper, *Ethnic and Group Voting in Nonpartisan Municipal Elections*, 30 PUB. OPINION Q. 79 (1966) (discussing voting behavior in nonpartisan contests). See generally Carol Cassel, *The Nonpartisan Ballot in the United States*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 226–41 (Bernard Grofman & Arend Lijphart eds., 1986); Brian F. Schaffner et al., *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q. 7 (2001); sources cited *supra* note 27.

⁴⁶ A number of election studies have documented the existence of "friends and neighbors" voting. See, e.g., Tom W. Rice & Alisa A. Macht, *Friends and Neighbors Voting in Statewide General Elections*, 31 AM. J. POL. SCI. 448 (1987); Raymond Tatalovich, "Friends and Neighbors" Voting: Mississippi, 1943–73, 37 J. POL. 807 (1975). A study of judicial retention elections in five states found a friends-and-neighbors effect for appellate judges but not for trial judges. Larry T. Aspin & William K. Hall, *Friends and Neighbors Voting in Judicial Retention Elections: A Research Note Comparing Trial and Appellate Court Elections*, 42 W. POL. Q. 587, 589–94 (1989).

⁴⁷ This study was a survey-based experiment in which some respondents were given the cities of residence of candidates for the Ohio Supreme Court and others were not. David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 716–18 (2001).

⁴⁸ Dubois, *supra* note 42, at 419.

disclosing incumbency on the ballot have produced mixed evidence on the impact of this information on voters' choices.⁴⁹

The ballots that voters confront in retention elections are distinctive in two respects. They include the name of only one candidate rather than two, thus reducing voters' ability to make use of whatever information they possess or think they possess about candidates. By definition, these ballots indicate that each candidate is an incumbent and structure the voter's choice in terms of a response to the candidate's incumbency. This structuring creates a tendency for voters to cast the same votes for or against all the judges on the same retention ballot.⁵⁰

Providing the candidates' party affiliations on the ballot has a fundamental impact on voters' choices that is far stronger than the effect of any other ballot information. The great majority of voters have positive or negative attitudes toward the two major parties, and most identify with one party or the other.⁵¹ Even in presidential contests, in which most voters know a good deal about the candidates, voters' attitudes toward the parties are a powerful influence on their choices.⁵² As the volume of other information declines, party identification is likely to become increasingly important as a basis for choices between candidates.⁵³ In judicial contests conducted with a partisan ballot, attitudes

⁴⁹ Klein & Baum, *supra* note 47, at 716–18; David Klein & Lawrence Baum, Ballot Forms and Vote Choice in Judicial Elections 18–21 (Jan. 1999) (unpublished manuscript) (on file with author).

⁵⁰ Larry Aspin, *Trends in Judicial Retention Elections, 1964–1988*, 83 JUDICATURE 79, 80–81 (1999). A survey of Wyoming voters in 1980 found a strong tendency to vote the same way on the two supreme court justices who faced retention votes and a very strong tendency to offer the same reasons for votes on the two justices. Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 70–75 (1983).

⁵¹ See HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2001–2002, at 114 (2001).

⁵² WILLIAM H. FLANIGAN & NANCY H. ZINGALE, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 69–70 (9th ed. 1998).

⁵³ Studies that compare voting in presidential elections with voting for other relatively visible offices—governorships and the United States Congress—have produced mixed evidence on the relative importance of voters' attitudes toward the parties as determinants of their choices. In particular there is not a consistent pattern in which voters' party loyalties play a more powerful role in shaping gubernatorial and congressional votes than they do in shaping presidential votes. Hinckley et al., *supra* note 26, at 143–45; Shaffer, *supra* note 26, at 13–19. See generally GERALD C. WRIGHT, JR., ELECTORAL CHOICE IN AMERICA: IMAGE, PARTY, AND INCUMBENCY IN STATE AND NATIONAL ELECTIONS (1974). Where information about the candidates is truly scarce, as it is in most contests for judgeships, a partisan ballot voters' party identifications are likely to be considerably more powerful than they are in elections for the

toward the parties are almost surely the chief determinant of the vote. Just as the various incumbents in a retention election tend to do about equally well, the same is true of the various judicial candidates from the same party in a partisan election.⁵⁴

As a result, partisanship has fundamental effects on the outcomes of judicial contests under the partisan ballot. The “normal vote”⁵⁵ for the two parties’ judicial candidates in any district or state reflects the balance of party identifications among people who participate in judicial contests. Thus candidates from a party that is dominant in a state or district have a great advantage. Similarly, candidates for statewide judgeships do better where their party is stronger. In states with partisan ballots, one study found that the county-level correlations between the vote shares received by parties’ candidates for the state supreme court and their candidates for governor were typically quite high.⁵⁶

Because attitudes toward the parties are so salient to voters, they can make a difference even in nonpartisan elections. But their effects depend on the proportion of voters who are aware of at least one candidate’s affiliation, and in most nonpartisan judicial elections that proportion is low.⁵⁷ As a result, partisan

most visible offices. Indeed, they are probably the dominant basis for choice under most conditions.

⁵⁴ One striking example involved the contests for the Alabama Supreme Court in 2000. The Republican candidate for chief justice was Roy Moore, a trial judge who had garnered national publicity and a good deal of support in his home state for defying a federal court order to remove the Ten Commandments from a wall of his courtroom. Moore defeated a very well-funded associate justice of the supreme court in the Republican primary. See Kevin Sack, *Ten Commandments’ Defender Wins Vote*, N.Y. TIMES, June 8, 2000, at A24. Despite his uniquely high visibility Judge Moore won the general election with 54.7% of the vote (excluding write-ins), a figure that was within 2.1% of the proportions obtained by the three Republican candidates for associate justice positions who faced Democratic opposition. General election results were obtained from the Alabama Secretary of State’s website at <http://www.sos.state.al.us/downloads/election/2000/general/2000g-general.pdf> (last visited Dec. 12, 2002). Of course, it is possible that this result was coincidental—that it resulted from a close balance between the number of voters who broke from party ranks to vote for Judge Moore and those who did so to vote against him.

⁵⁵ See Philip E. Converse, *The Concept of a Normal Vote*, in ANGUS CAMPBELL ET AL., ELECTIONS AND THE POLITICAL ORDER 9 (1966).

⁵⁶ In other words, to take one example, counties in which the Democratic gubernatorial candidate did best tended to be those in which the Democratic candidates for the supreme court also did best. DUBOIS, *supra* note 40, at 70–92. A more recent study found a similar effect over time in Texas. L. Douglas Kiel et al., *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290, 292 (1994).

⁵⁷ Voters who do not know the candidates’ party affiliations can attempt to infer those affiliations from candidates’ names, and this behavior appears to be reasonably common among voters in at least some states that use the nonpartisan ballot. DUBOIS, *supra* note 40, at 81–92.

elections structure the vote more firmly along partisan lines. The most direct evidence of this effect came in a study of the Ohio Supreme Court elections of 1998. In pre-election and post-election surveys, some respondents were simply given the candidates' names (as the Ohio ballot does in judicial contests), while others were supplied the candidates' party affiliations as well. Providing party affiliations substantially increased the tendency of voters to support the candidate who shared their own affiliation.⁵⁸ In states with nonpartisan ballots, the county-level correlations between the vote shares of a party's judicial and gubernatorial candidates were considerably weaker and more variable than in partisan states.⁵⁹

Of course, judicial elections are not homogeneous in the information that is available to voters and that the average voter takes to the polling place. One question is how contests for different levels of judgeships compare. We lack systematic data about voter information across levels, so any comparison at this point must be speculative.

IV. THE FATES OF INCUMBENTS

What we know about voters in judicial elections can be applied to the situations of incumbent judges as well as the impact of higher-profile judicial campaigns on incumbents. It appears that under ordinary conditions, incumbent judges hold a series of advantages in electoral contests. Although judges typically enjoy much lower name recognition than the holders of offices such as senator and governor, they are likely to begin the campaign with greater recognition than their opponents.⁶⁰ Like other incumbents, they tend to have more campaign money to spend than their opponents.⁶¹ Among other things, higher spending typically enhances an incumbent's lead in name recognition. All

⁵⁸ It is interesting that most of the change resulting from providing the candidates' affiliations was from abstention to support for the candidate of the voter's party. Klein & Baum, *supra* note 47, at 723–24.

One study of retention elections found mixed evidence on the impact of information related to judges' party affiliations. In a survey prior to the elections for the California Supreme Court in 1982, some voters were told the name of the governor who had appointed an incumbent, while others were not; in two of the four contests, this information increased the role of voters' party identifications in determining their votes. Peverill Squire & Eric R. A. N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. POL. 169, 172 (1988).

⁵⁹ DUBOIS, *supra* note 40, at 70–92.

⁶⁰ There is very little empirical evidence on this proposition. Some mixed evidence from two contests for the Ohio Supreme Court is presented in Baum, *supra* note 4, at 28.

⁶¹ See, e.g., Robert Moog, *Campaign Financing for North Carolina's Appellate Courts*, 76 JUDICATURE 68, 75 (1992).

else being close to equal, lawyers' groups⁶² and the news media can be expected to support incumbents. In states with partisan elections, incumbents (or at least those who have won prior elections) usually are from the majority party in their electoral district. For their part, judges who run in retention elections benefit from a tendency of voters to cast "yes" votes.⁶³

These advantages are reflected in the results of judicial contests. In the period from 1980 through 1995, 92% of state supreme court justices who faced the voters were successful.⁶⁴ This figure was slightly lower than the proportion of members of the House of Representatives who won re-election.⁶⁵

Although data on the electoral fates of lower-court judges are spotty and largely out of date, it appears that incumbents below the supreme court level fare even better. Michigan, Ohio, and California elect judges on the nonpartisan ballot, though Michigan and Ohio use partisan nomination procedures. From 1948 to 1968, incumbents on Michigan's trial courts of general jurisdiction won their electoral contests 95% of the time.⁶⁶ The success rate for judges on the comparable courts in California from 1958 to 1980 was 99%.⁶⁷ In the 1962 to 1980 period, previously elected judges on Ohio's general jurisdiction courts won re-election 94% of the time.⁶⁸

All of these trial court studies were carried out prior to the past two decades, before strong campaigns against judicial incumbents became more common. But that growth has occurred primarily at the supreme court level, so it is likely that

⁶² At the extreme, one study reports that "some bar associations have a policy of rating incumbents first, and only evaluate opponents if an incumbent is not rated qualified to retain office." SARA MATHIAS, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* 25 (1990) (citing MILWAUKEE BAR ASS'N, *LAWYERS' JUDICIAL ENDORSEMENT SYSTEM* (Jan. 1989)).

⁶³ See Aspin, *supra* note 50.

⁶⁴ Hall, *supra* note 17, at 319. This figure is based on all judges who sought new terms. Thus it includes judges in partisan and nonpartisan election states who ran unopposed.

⁶⁵ The success rate for state supreme court justices was 91.7%, for House members 93.5%. *Id.*; see also STANLEY & NIEMI, *supra* note 51, at 51-54 (presenting more extensive data on success rates for congressional incumbents).

⁶⁶ See Susan B. Hannah, *Competition in Michigan's Judicial Elections: Democratic Ideals vs. Judicial Realities*, 24 WAYNE L. REV. 1267, 1303 (1978) (providing the data from which these results were calculated).

⁶⁷ Dubois, *supra* note 42, at 399.

⁶⁸ Lawrence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420, 424 (1983). Appointed judges who were facing their first elections did less well, with a success rate of about 86%. *Id.* at 425. That success rate is impressive, however, for two reasons: appointed judges have a limited opportunity to achieve name recognition during their short time in office prior to their first election, and some appointees run in counties in which their party is a distinct minority among the voters.

trial (and intermediate appellate) judges continue to do very well at the polls. Research to test the accuracy of this surmise would be useful.

There are more comprehensive data on retention elections. In ten states, the overall success rate for incumbents at all levels between 1964 and 1994 was 99%. About half of all the defeats occurred in one state, Illinois, and all but one of the Illinois defeats resulted from the state's unique requirement of a 60% affirmative vote for retention. The very high success rate in retention elections applied to courts at all levels.⁶⁹

There is a general perception that judges are most vulnerable to defeat in partisan elections and least vulnerable in retention elections. This perception appears to be accurate. In the 1980 to 1995 period, Melinda Gann Hall found that 19% of incumbents in states with partisan elections were defeated, compared with 9% in nonpartisan elections and 2% in retention elections.⁷⁰ Although we do not have comparable data on elections to lower courts, it is likely that the same pattern of differences across election systems appears in those elections.

The first requisite for defeat is opposition. In states with partisan or nonpartisan elections, high proportions of judges run without opposing candidates.⁷¹ Indeed, in some states challenges to incumbents are the exception to the rule. Of the California Superior Court judges who won re-election in the study cited earlier, for the period from 1958 through 1980, only 6.3% had to defeat an opponent.⁷² Despite subsequent changes in judicial elections, challenges to incumbents on that court are still exceptional. For instance, among the 142 Superior Court judges who came up for election in Los Angeles County in 2002, only two were opposed.⁷³ Supreme court contests are the most likely to be contested, but in the 1980 to 1995 period almost half of all incumbents across the country ran unopposed.⁷⁴

Incumbent judges are more likely to face opposition in partisan elections than in nonpartisan elections. In the 1980 to 1995 period, the proportions of supreme court justices with challengers were 44% in states with nonpartisan

⁶⁹ Aspin et al., *supra* note 17, at 8–12.

⁷⁰ Hall, *supra* note 17, at 318.

⁷¹ For that matter, even seats without incumbents often have only a single aspirant on the ballot. Ohio probably has higher proportions of contested judicial races than most other states, but in 1998 more than half of its races were uncontested. LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 110 (5th ed. 2001).

⁷² See Dubois, *supra* note 42, at 399 (providing the data from which these results were calculated).

⁷³ Jean Guccione, *Elected Judges Are a Rare Breed Indeed*, L.A. TIMES, Feb. 22, 2002, at B2.

⁷⁴ Hall, *supra* note 17, at 317.

elections and 61% in those with partisan elections.⁷⁵ In part, this difference reflects the interest of party organizations in running candidates in as many partisan contests as possible.⁷⁶

Opposition does not have the same meaning in retention elections in that voters can turn a judge out of office without an opponent's taking the initiative to get on the ballot. In practice, however, some kind of vocal opposition is required to defeat a judge.⁷⁷ In the great preponderance of retention elections, such opposition is lacking. One survey of judges in ten states with retention elections found that only 13% had engaged in campaigns to retain their positions. If Illinois is excluded, the proportion drops to 2%. Of the judges who had campaigned, only 21% were opposed by bar associations, citizen groups, or newspapers.⁷⁸

Of course, in retention elections voters still have a choice of affirmative or negative votes even in the absence of visible opposition to an incumbent. In that situation voters tend to react to their choice in terms of their general attitudes toward government and the courts. As noted earlier, judges in a particular electoral district typically win similar proportions of positive votes. Proportions of positive votes fluctuate over time largely in unison with the level of trust in government.⁷⁹

If the normal state of affairs is victory for the incumbent, defeat requires explanation. When contests take the usual low-information form, the primary explanation lies in unusual characteristics of information on the ballot.

⁷⁵ *Id.*

⁷⁶ Party organizations generally play a more active role at all stages of the judicial election process in states that employ the partisan ballot. *See, e.g.,* Patricia Kilday Hart, *Disorder in the Court*, TEX. MONTHLY, Mar. 1988, at 118 (on Texas Supreme Court); STATE OF N.Y. COMM'N ON GOV'T INTEGRITY, BECOMING A JUDGE: REPORT ON THE FAILINGS OF JUDICIAL ELECTIONS IN NEW YORK STATE 13, 23-25 (1988); FUND FOR MODERN COURTS, THE ILLUSION OF DEMOCRACY: NEW YORK CITY CIVIL COURT ELECTIONS 1980-1985, at ix-xii (1986). This activity may contribute to the relatively high rate of defeat for incumbents in partisan election states, or at least those states in which party organizations regularly promote challenges to incumbents of the other party. But the party cue on the ballot almost surely is the primary source of that difference.

⁷⁷ Illinois, with its 60% requirement, may be a partial exception.

⁷⁸ It appears that the judge rather than the election is the unit of analysis for these figures, so the rates of campaigning and opposition per election are probably somewhat lower. Larry T. Aspin & William K. Hall, *Campaigning for Retention in Illinois*, 80 JUDICATURE 84 (1996); Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 308 (1994). Aspin and Hall concluded tentatively that the initial selection of Illinois judges in partisan elections and to a lesser degree the state's unique 60% requirement for retention accounted for the difference between Illinois and other states. *Id.*

⁷⁹ Aspin, *supra* note 50, at 79-80; Larry T. Aspin & William K. Hall, *Political Trust and Judicial Retention Elections*, 9 LAW & POL'Y 451, 456 (1987).

Sometimes a challenger enjoys a substantial advantage in name recognition and wins for that reason alone. During the 1990s, one member of the Washington Supreme Court lost his seat and another won by a small margin when they faced challengers who engaged in minimal campaigns but who had attractive names.⁸⁰ In 2002, Texas Supreme Court Justice Xavier Rodriguez lost to challenger Steven Wayne Smith in the Republican primary election despite a 60-to-1 spending advantage. In Rodriguez's view, shared by most observers, Smith's advantage was "a simpler name."⁸¹ Challengers also can benefit from a surname held by a popular political figure.⁸²

In states that employ partisan elections, incumbents may lose their seats because of unfavorable partisan conditions. Like legislators, incumbent judges are fairly secure in electoral districts in which their party has clear majority status and are more vulnerable where their party is in the minority.⁸³ For the same reasons, incumbents become more vulnerable in election years or eras in which their party loses strength. In the South, most notably in Texas, the Republican resurgence in recent years has worked to the advantage of Republican candidates for judgeships.⁸⁴ One sign of this effect is the substantial number of southern

⁸⁰ William S. Bailey, *Time to Change the Way We Pick Judges*, SEATTLE TIMES, Sept. 28, 1994, at B7; Robb London, *For Want of Recognition, Chief Justice Is Ousted*, N.Y. TIMES, Sept. 28, 1990, at B16.

⁸¹ John Council & Mary Alice Robbins, *Name of the Game: Smith Upsets X-Rod in Shocking High Court Republican Primary*, TEX. LAW., Mar. 18, 2002, at 1, 1; see also Janet Elliott, *Election 2000: Fund Disparity No Advantage in Court Case*, HOUSTON CHRON., Mar. 14, 2002, at A38. It may have been that, just as some voters infer that female candidates are relatively liberal, see *supra* note 41, some conservative Republican voters inferred that a Latino candidate was less conservative than an Anglo candidate and chose Smith on that basis.

⁸² See, e.g., Stephen Hudak, *Democrat with Name Zaps Court Incumbent*, PLAIN DEALER (Cleveland, Ohio), Nov. 9, 2000, at 1B (discussing election for the Ohio Domestic Relations Court).

Of course, the advantages of attractive and familiar names extend to contests without incumbents. See, e.g., Editorial, *Voter Education Key in Judicial Races*, AUSTIN AM.-STATESMAN, Mar. 17, 2002, at H2 (reporting on 2002 Texas judicial primaries).

⁸³ This effect occurs even in Ohio's "semi-partisan" system. A study of elections to the Ohio Court of Common Pleas, the trial court of general jurisdiction, in the 1962 to 1980 period found that Republican incumbents did about equally well in more Democratic and more Republican counties, but Democrats were far more likely to lose in Republican counties. For appointed incumbents who were facing the voters for the first time, the partisan makeup of a county made a substantial difference for incumbents of both parties. Baum, *supra* note 68, at 427-28. Had Ohio used a partisan ballot along with its partisan primary election, the impact of county partisan strength undoubtedly would have been even stronger.

⁸⁴ Kiel et al., *supra* note 56. After his defeat in the 1996 election, a Democratic judge in Texas said, "I don't think a Democrat, in the next four years, is going to have a snowball's

Democratic judges who have switched parties in efforts to keep their seats.⁸⁵ An unfavorable partisan balance is most likely to be problematic for appointees who face their first elections, because governors usually appoint party colleagues to judgeships even in areas where their party is weak.

Even taking these difficulties into account, incumbent judges generally benefit if their electoral contests take the standard low-information format. If voters know little about the candidates, and the incumbent holds the usual advantages in name recognition and other conditions, the odds strongly favor re-election. Thus challengers usually have the best chance of winning when they and their supporters can elevate the level of information available to voters, providing them with reasons to vote against the incumbent.

In small communities or counties, that mission can be achieved by word of mouth. Indeed, incumbents whose performance on the bench raises questions may be especially vulnerable in rural areas where information about government officials spreads most rapidly.⁸⁶ Elsewhere, success in communicating reasons to vote against incumbents usually requires effective access to the mass media. Achieving this access requires either that media organizations disseminate the negative message in news stories and editorials⁸⁷ or that opponents pay for media coverage themselves.

chance of beating a Republican" in a statewide contest. *Judge Not*, TEX. OBSERVER, Nov. 22, 1996, at 32.

⁸⁵ Stephen J. Adler, *The Texas Bench: Anything Goes*, AM. LAW., Apr. 1986, at 14; David Maraniss, *In Wright's Texas, Alliances Are Shifting*, WASH. POST, Aug. 10, 1989, at A3; Sue Anne Pressley, *Texas GOP Spotlights Party-Switchers*, WASH. POST, Oct. 14, 1997, at A6; Kevin Sack, *G.O.P Drive Spreads as 10 Alabama Judges Jump Parties*, N.Y. TIMES, Jan. 4, 1996, at A14.

⁸⁶ See Paul Raymond & Peter Paluch, *The American Voter in a Local, Judicial Election* (1994) (paper presented at annual meeting of the Midwest Political Science Association in Chicago) (on file with author) (analyzing two models of voting behavior in a local, judicial election based on data from a rural New York area).

⁸⁷ A vivid example of the role of the media as entrepreneurs in judicial campaigns occurred in Orange County, California, in 2002. David Haldane, *Write-In Rivals of Kline Face Tall Order*, L.A. TIMES (Orange County ed.), Feb. 28, 2002, at B1. No candidate filed to run against an incumbent trial court judge in a nonpartisan primary election. Id. After the filing deadline the judge was charged with child molesting and possession of child pornography. Id. Several candidates sought to win write-in votes, and the local news media heavily publicized the charges and the write-ins. Id. Ultimately 67% of the primary election vote went to the write-in candidates, one of whom received slightly more votes than the incumbent. Jack Leonard, *Write-In Candidate's Tally Tops Kline's*, L.A. TIMES (Orange County ed.), Mar. 22, 2002, at B1. Because no candidate had won a majority, the incumbent and the leading challenger would compete in the general election. Id. Facing certain defeat in the general election, the incumbent withdrew his candidacy. *Yaffe Allows Embattled Judge to Withdraw Re-Election Bid*, METROPOLITAN NEWS-ENTERPRISE (L.A.), June 21, 2002, at 1, <http://www.metnews.com/articles/klin062102.htm> (last visited Jan. 23, 2002).

Even when the media provide free coverage to opponents of incumbents, they are usually responding to campaigns against an incumbent. The greater the scale of opposition campaigns, the more likely they are to attract media attention. Thus money is the most important key to the effectiveness of campaigns to defeat sitting judges. For this reason the growth in the general level of spending in judicial campaigns over the past two decades is a development of considerable importance.⁸⁸

The sources of funding for judicial campaigns are the standard ones: candidates themselves, individuals with whom they have some kind of association, political parties,⁸⁹ and interest groups with a strong stake in court policies. The last category has emerged as increasingly important in recent years, and it is the key source of the growth in judicial campaign spending.⁹⁰

The interest groups involved are primarily groups whose stakes in court decisions are economic: business, labor, and professional groups, and the segments of the bar that represent their interests.⁹¹ Symbolizing this development is the recent financial participation of the U.S. Chamber of Commerce in judicial campaigns.⁹² Increasingly, interest groups have conducted their own campaigns

⁸⁸ See Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1493–94 (2001); see also GOLDBERG ET AL., *supra* note 1, at 7–8 (presenting evidence on spending in judicial campaigns); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 59–60 (1985) (same); Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court Elections*, 84 JUDICATURE 20, 22 (2000); James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 JUDICATURE 10, 12–18 (2000); Moog, *supra* note 61 (discussing trends in North Carolina); Marlene Arnold Nicholson & Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 JUDICATURE 294, 294–95 (1994).

⁸⁹ The roles of the parties in funding campaigns are put in the context of other developments in judicial elections in Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411 (2001).

⁹⁰ Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001); Sheila Kaplan, *Justice for Sale*, COMMON CAUSE MAG., May/June 1987, at 29; Sheila Kaplan & Zoë Davidson, *The Buying of the Bench*, THE NATION, Jan. 26, 1998, at 11; see also Anthony Champagne & Kyle Cheek, *PACs and Judicial Politics in Texas*, 80 JUDICATURE 26 (1996) (discussing contributions to candidates by political action committees in Texas); Traci V. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21 (1996) (discussing same in North Carolina).

⁹¹ See, e.g., Peter Applebome, *Rubber Stamp Is Gone in Texas Judicial Election*, N.Y. TIMES, Oct. 21, 1988, at B7.

⁹² MARK KOZLOWSKI, REGULATING INTEREST GROUP ACTIVITY IN JUDICIAL ELECTIONS 1–4 (2002), available at <http://www.brennancenter.org/resources/jiseries/jiseries1.pdf> (last visited Dec. 12, 2002); William Glaberson, *U.S. Chamber Will Promote Business Views in Court Races*, N.Y. TIMES, Oct. 22, 2000, at A24. The involvement of the Chamber and other business groups in judicial contests is discussed in John D. Echeverria, *Changing the Rules by*

independent of the candidates they support. The independence of campaigns against incumbents is automatic in retention elections, where there is no opposition candidate.

What has caused the growth of interest-group participation in judicial campaigns? The key factor is probably contagion: when some groups seemed to achieve success in defeating judges, other groups on the same side of interest-group conflicts picked up the idea, and groups on the opposing side mobilized to counteract the influence they observed. This development has concentrated on state supreme courts, reflecting the relatively high stakes that groups perceive in decisions of the highest state courts and the more visible activism of state supreme courts since the 1970s.⁹³

The messages presented by opponents of sitting judges can take a variety of forms.⁹⁴ The most common form is standard campaign appeals with little

Changing the Players: The Environmental Issue in State Judicial Elections, 9 N.Y.U. ENVTL. L.J. 217, 235 (2001).

⁹³ See Lawrence Baum, *Supreme Courts in the Policy Process*, in *THE STATE OF THE STATES* 143 (Carl E. Van Horn ed., 3d ed. 1996).

⁹⁴ I focus on opponents' messages for two reasons. First, because incumbents typically start out with an advantage, opponents must do something to overcome that advantage. Second, criticism of incumbents has more direct implications for judicial independence.

Of course, incumbents conduct their own campaigns, and they or their supporters can attack challengers in the same ways that opponents attack incumbents, especially if the challengers also have served as judges. For instance, in a contest for the Michigan Supreme Court in 2000, the state Republican Party aired a commercial accusing the challenger—a court of appeals judge—of being soft on crime. The commercial focused on a case involving child molestation and, according to one contemporary account, “shows [the judge’s] name and the word ‘pedophile’ on the screen at almost the same time.” Kathy Barks Hoffman, *High-Stakes Supreme Court Races Become Nasty*, DETROIT NEWS, Oct. 21, 2000, <http://www.detnews.com/2000/politics/0010/21/politics-137221.htm> (last visited Dec. 12, 2002).

In another example, an Alabama Supreme Court justice ran a commercial that made several strong personal attacks on his challenger in the 1996 election. Editorial, *Enforce the Rules: Ingram Ignored Ethical Canons*, MONTGOMERY ADVERTISER, Nov. 9, 1996, at 12A. The challenger won by a narrow margin. As an associate justice, four years later, he ran for chief justice and issued an attack against his trial-judge opponent that resulted in an accusation by the state Judicial Inquiry Commission that his advertising was false and misleading. George Lardner Jr., *Speech Rights and Ethics Disputed in Judicial Races*, WASH. POST, Oct. 8, 2000, at A13; see also *Butler v. Ala. Judicial Inquiry Comm’n*, 111 F. Supp. 2d 1241 (M.D. Ala. 2000). That the victim of seemingly unfair campaign attacks should become the alleged perpetrator of such attacks symbolizes the growth in hard-hitting campaign appeals both for and against judicial incumbents.

A final example, from a trial court contest in California, involved an incumbent judge who mailed a campaign brochure attacking her opponent for representing a defendant who was accused of murdering a deputy sheriff. As described in a newspaper story, “[t]he cover of Gray’s four-page mailer depicted a police officer with the phrase ‘Cop Killer’ in large print at

substantive content, appeals that may achieve high positive name recognition for the challenger in a contested election. Less often, opponents raise questions about a judge's qualifications or off-the-bench behavior. But most controversial and most relevant to issues of judicial independence are messages related to issues of legal policy.

Legal policy messages are controversial chiefly because of the widespread belief that it is illegitimate for judicial candidates to take positions on issues they could address in future cases. That belief has been reflected in state codes of judicial conduct. Most states that elect judges adopted a provision in the 1990 Model Code of Judicial Conduct of the American Bar Association, a provision that prohibits candidates for judgeships from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court"; other states adopted provisions with different language but a similar purpose.⁹⁵ But judicial candidates sometimes evaded or directly flouted these rules. Moreover, participants in judicial elections other than candidates were not bound by them. This was one attraction to interest groups (and to political parties) of running independent campaigns in judicial elections, and these independent campaigns were especially likely to raise issues of legal policy.⁹⁶

The Supreme Court's decision in *Republican Party of Minnesota v. White*⁹⁷ largely invalidated state laws that prohibit discussion of judicial issues by candidates for judgeships. Even if most judicial candidates refrain from using the freedom that the *White* decision gives them, undoubtedly the decision will increase the frequency with which candidates state explicitly how they stand on issues. In the process, it will facilitate issue-based attacks on incumbents by challengers.

Among the judicial issues that opponents can raise against sitting judges, criminal justice stands in a unique place. Crime is a highly salient issue. Moreover, voters typically perceive the courts as too lenient in dealing with criminal defendants. When asked whether "the courts in this area deal too harshly or not harshly enough with criminals," the overwhelming majority of

the bottom of the page. 'Now Elliot Daum wants you to elect him judge,' it added." Pamela J. Podger, *Judge Probed over Tactics in Campaign*, S.F. CHRON., Jan. 4, 2001, at A13.

⁹⁵ Brief for the Petitioners Republican Party of Minnesota et al. at 28 n.31, *Republican Party of Minn. v. Kelly*, 534 U.S. 1054 (2002) (No. 01-251).

⁹⁶ In 2000, according to one study, 18% of the television commercials sponsored by candidates attacked the candidate's opponent, while another 8% compared the two candidates. The comparable figures for party-sponsored commercials were 27% and 57%, respectively. For interest group-sponsored commercials, the proportions were 80% and 10%, respectively. GOLDBERG ET AL., *supra* note 1, at 17. Undoubtedly, a substantial proportion of the "attack" commercials addressed policy issues.

⁹⁷ 563 U.S. 765 (2002).

survey respondents chose the "not harshly enough" option (68%, versus 8% responding "too harshly," in 2000). This is a striking finding in an era of increasing severity in sentencing and declining crime rates.⁹⁸

In this climate of opinion, creating the impression that a judge is soft on crime can have great electoral impact.⁹⁹ Convincing voters that a judge is unwilling to impose or uphold death sentences is uniquely effective because capital punishment is especially salient and easy to understand. These conditions are reflected in the success of some opposition campaigns based on the death penalty. The prototype was seen in California in 1986, when the chief justice and two associate justices of the state supreme court were defeated by campaigns engineered by conservative groups focusing on the death penalty.¹⁰⁰

Some opposition campaigns focus on other criminal justice issues. A Chicago trial judge lost a retention election in 1986 after a police campaign spurred by his acquittal of a defendant who allegedly had assaulted a police officer.¹⁰¹ A Nebraska Supreme Court justice was defeated in 1996 partly on the basis of his interpretation of a second-degree murder statute.¹⁰² One memorable newspaper advertisement charged that a California municipal judge had never sentenced a defendant to prison, neglecting to add that municipal judges had no power to issue prison sentences.¹⁰³

⁹⁸ The margin in favor of the view that the courts were insufficiently harsh has narrowed somewhat, perhaps due to declining crime rates and increasing court severity. The margin had been 85% to 3% in 1994. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, 139 (Kathleen Maguire & Ann L. Pastore eds., 2001) (presenting survey data).

⁹⁹ Of course, sitting judges and their supporters can also proclaim their conservatism in criminal justice to defend themselves against actual or potential attacks or simply to appeal to voters. See, e.g., *Chamber of Commerce v. Moore*, 191 F. Supp. 2d 747, 751–52 (S.D. Miss. 2000) (describing such advertisements).

¹⁰⁰ John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 353–54 (1987); see also Traci V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, in RESEARCH ON JUDICIAL SELECTION 1999, at 41, 49–52 (2000) (describing campaigns in which the incumbent's position on the death penalty was a basis for opposition in Nebraska and Tennessee); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 846–47 (1986) (discussing same in the 1980s).

¹⁰¹ Charles Mount, *Judge Taken off Bench by Voters Makes Bid to Return*, CHI. TRIB., Oct. 15, 1988, § 1, at 5.

¹⁰² Reid, *supra* note 100, at 52–55.

¹⁰³ Gail Diane Cox, *Jerry's Judges*, NAT'L L.J., May 25, 1992, at 30; see also David M. Jones, *Ideology & Judicial Elections in Wisconsin*, COMP. ST. POL., Aug. 1989, at 6, 6–7 (discussing a Wisconsin Supreme Court contest in which criminal justice issues were raised against the incumbent).

To a much lesser degree, opposition groups use other social issues that are very important to some voters. Conservative groups, for instance, have employed issues such as abortion and gun control, sometimes in conjunction with criminal justice issues.¹⁰⁴ But the division of voter opinion on these issues reduces their efficacy in most states.

Most interesting are the economic issues that provide the primary motivation for large-scale campaigns against incumbents by interest groups.¹⁰⁵ With a widespread perception of a litigation explosion and of courts that are unduly sympathetic to personal injury plaintiffs, business and professional groups seem to have a potent issue to use against liberal judges. Indeed, some campaigns emphasize this issue.¹⁰⁶ But opinion on this issue is divided, and it is not nearly as salient as crime. Therefore economic groups often present public campaigns

¹⁰⁴ For instance, two Florida Supreme Court justices faced opposition from conservative groups in their retention elections in the early 1990s. Along with criminal justice, abortion was an issue in both opposition campaigns and gun control in one. See Andrew Blum, *Jurists, Initiatives on Ballot*, NAT'L L.J., Nov. 16, 1992, at 1, 31; Karen Branch, *Politics and Florida's Highest Court*, MIAMI HERALD, Nov. 1, 1992, at 6M; *State's Chief Justice Keeps His Seat*, MIAMI HERALD, Nov. 7, 1990, at 17A. Both candidates won retention. In 1998, two California Supreme Court justices easily won retention after a small-scale opposition campaign based on their votes to strike down a statute requiring parental consent for abortions. Gail Diane Cox, *Ouster of Two Calif. Justices Sought*, NAT'L L.J., June 29, 1998, at A8; *Supreme Court Justices Handily Win New Terms*, S.F. EXAMINER, Nov. 4, 1998, at A27. In 2001, an Idaho Supreme Court justice was defeated by conservative groups who attacked her position on water rights and raised other social issues. Echeverria, *supra* note 92, at 238–54; William Glaberson, *supra* note 1.

In a 1998 contest for the Georgia Supreme Court, the challenger put out a brochure charging that the incumbent “would require the State to license same-sex marriages,” “referred to traditional moral standards as ‘pathetic and disgraceful,’” and “called the electric chair ‘silly.’ ” *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1340 (N.D. Ga. 2000). A revised brochure and television commercial made similar charges. *Id.* The incumbent was re-elected by a large margin. *Id.*; see also Champagne, *supra* note 90, at 1405–06 (discussing several examples of campaigns involving issues other than criminal justice).

¹⁰⁵ The role of economic issues as a source of growth in the scale of judicial campaigns is illustrated by the detailed discussion of developments in Champagne & Cheek, *supra* note 40 (Texas), and Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL'Y 645, 656–61 (1999) (Alabama).

¹⁰⁶ An example was evident in the campaigns for the Michigan Supreme Court in 2000, in which the issues ranged widely but economic issues were especially prominent. See Charlie Cain, *High Court Race Will be Nasty, Pricey*, DETROIT NEWS, June 23, 2000, at 1; Jim Irwin, *Michigan Voters Have Last Word in Bitter Supreme Court Race*, ASSOCIATED PRESS STATE & LOCAL NEWS WIRE, Nov. 7, 2000, LexisNexis Academic, The Associated Press State & Local Wire File.

that focus on judges' qualifications¹⁰⁷ or on criminal justice issues¹⁰⁸ rather than on the economic issues that motivated the groups' participation in judicial contests.¹⁰⁹

We lack a clear picture of the frequency of success and failure for efforts to defeat incumbent judges that are motivated by their decisions. Nor has there been a systematic study of the conditions that determine the chances for success. What we do know about voters in judicial contests, however, provides a perspective from which to think about the effectiveness of this type of anti-incumbent campaign.

The key fact is that voters' usual inattention to contests for judgeships creates both a challenge and an opportunity for opponents of incumbents. The challenge is to reach voters with reasons to vote against the incumbent. Even with the recent growth in the funding of judicial campaigns, the level of spending on behalf of most challengers is insufficient to capture the attention and influence the decisions of most voters. Of course, influencing even a relatively small

¹⁰⁷ In some ways the classic example of such a campaign was the defeat of Ohio Chief Justice Frank Celebrezze in 1986. Celebrezze had led the Ohio Supreme Court in a markedly liberal direction on issues in tort law, and economic interest groups worked hard to defeat him. But the campaign against him emphasized allegations about his conduct as chief justice, and it was those allegations that resulted in his defeat. G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 172-76 (1988); Hojnacki & Baum, *supra* note 39.

¹⁰⁸ One example was a 1996 campaign for the Georgia Court of Appeals in which the challenger attacked the incumbent for an opinion that had reversed the conviction of a confessed child molester. One commentator noted that "the personal injury lawyers who bankrolled [the challenger's] advertising campaign . . . were not really mad at Judge Andrews for coddling a child molester. They were mad at him for coddling insurance companies." Stuart Taylor Jr., *Campaigning for the Bench*, *LEGAL TIMES*, July 22, 1996, at 21. The successful efforts to defeat three California Supreme Court justices arguably fit into this category as well. See Wold & Culver, *supra* note 100. But see Roy A. Schotland, *Introduction: Personal Views*, 34 *LOY. L.A. L. REV.* 1361, 1362 n.4 (2001) (arguing that conservative economic groups played a limited role in funding the campaign to defeat the California justices).

¹⁰⁹ Straddling the line between qualifications and economic issues are campaigns in which the incumbent is attacked for alleged improper behavior that is related to economic issues. Two Ohio campaigns against the same incumbent supreme court justice, Alice Robie Resnick, attacked her for receiving contributions from personal injury lawyers. A 1994 commercial "featured a mock \$300,000 check [to the incumbent] from the law firm of 'Sue & Sue,' signed by 'Cheatem Good'." James Bradshaw, *Judge Reprimanded Over '94 Election Ad*, *COLUMBUS DISPATCH*, Dec. 7, 1996, at 1D. Six years later, business groups funded a commercial against Resnick in which "a blindfolded justice statue . . . peeks at a pile of money on her scales. The ad says Resnick received \$750,000 in campaign contributions from trial lawyers and asks, 'Is justice for sale in Ohio?'" Darrel Rowland & James Bradshaw, *State Elections Panel Reaffirms Legality of Anti-Resnick TV Ad*, *COLUMBUS DISPATCH*, Oct. 27, 2000, at D10. Resnick won both elections.

minority of voters may be sufficient to change the outcome of a judicial contest. However, incumbents, who typically begin the campaign with a substantial advantage, often can withstand the loss of some voter support.

The opportunity lies in the shallow roots of most voters' predilections in judicial contests. Voters inclined to support the incumbent usually lack strong reasons for that inclination. If the incumbent's opponents can communicate strong reasons to vote for a challenger or against retention, they may achieve considerable influence. For example, convincing a high proportion of voters that a judge is soft on crime can be sufficient to defeat that judge. For that matter, even non-substantive considerations can threaten a judge's tenure. In states that employ nonpartisan elections, finding a challenger with a pleasantly familiar name might be the most effective step for an interest group that seeks to defeat an incumbent. Boosting a challenger's name recognition with heavy advertising that lacks much content is a valuable step as well.

In recent years it has become clear that spending very large sums of money to defeat incumbents is not enough to ensure success. The failures of some well-funded challenges to state supreme court justices in 2000¹¹⁰ highlight that reality. Voters may find proffered reasons to remove a judge from office insufficiently credible or significant to guide their vote. Further, an effective campaign in support of an incumbent can neutralize the impact of an opposition campaign, even if the opposition spends more money. In this context and in general, voters should not be regarded as passive recipients of campaign messages.

V. IMPLICATIONS OF THE EVIDENCE

As the survey of evidence in this article indicates, we have an incomplete picture of judicial elections in practice. As a result, we also have an incomplete picture of the relationship between the election process and judicial independence. Still, some tentative conclusions are possible.

Today, as in the past, most judicial elections are relatively quiet. Compared with the contests at the top of the ballot, contests for judgeships typically provide very limited information to voters. Lacking much information, voters frequently decline to choose between judicial candidates. When they do make a choice, they base that choice on the scraps of information they do hold, primarily the information they can glean from the ballot.

On the whole, this situation favors incumbents. They usually enjoy at least a mild advantage over their opponents in name recognition prior to the campaign, and they can usually spend more money than their opponents to extend that

¹¹⁰ See Mills & Waddle, *supra* note 35 (Mississippi); T.C. Brown, *Resnick Overcomes Attacks, Wins High Court Race*, PLAIN DEALER (Cleveland, Ohio), Nov. 8, 2000, at 1A (Ohio); Irwin, *supra* note 106 (Michigan).

advantage during the campaign. In states that employ partisan ballots, most incumbents have the advantage of majority-party status in their counties or other election districts. In states that use retention elections, the voters who are inclined to vote against any incumbent are greatly outnumbered by those inclined to cast affirmative votes. Incumbents' advantages discourage challengers in partisan and nonpartisan elections, combining with other forces to produce a high rate of default victories for sitting judges.

The low-information character of most judicial contests does leave some incumbents vulnerable to defeat. In states that employ partisan elections, a Republican may lose a judgeship simply because a county leans Democratic, and a good Republican year in a state may sweep out some Democratic judges. In states with nonpartisan elections, when the challenger enjoys an advantage in name recognition, an incumbent may lose even in the absence of a significant opposition campaign. These instances, though, are clearly exceptions to the rule.

The proportion of judicial contests that depart from the low-information model surely has increased over the past two decades, though the extent of this growth is uncertain. It has been concentrated at the state supreme court level and has been sufficiently widespread at that level to constitute a significant trend. There may be a similar trend in lower level courts, but it does not appear to be nearly as strong. For instance, contests for intermediate appellate judgeships, ordinarily the least visible of all court levels, seem to have changed relatively little.¹¹¹

Has judicial independence declined? For state supreme court justices, almost certainly it has. Justices are now more likely to face strong opposition campaigns that are based in large part on their judicial votes and opinions. Primarily in criminal justice and secondarily on other economic and social issues, justices face a greater risk of paying an electoral price for the positions they take in cases. To a lesser degree the same development has occurred in contests for trial court judgeships.

The effect of this trend on judges' *perceptions* of their independence undoubtedly is substantial. Large-scale campaigns against incumbent judges that achieve success or come close to it are vivid events. Like other vivid events, they are likely to be exaggerated by observers—especially observers to whom they are quite relevant.¹¹² Thus it is not surprising that state judges have expressed great concern about their vulnerability to defeat on the basis of their decisions.¹¹³

¹¹¹ This judgment should be regarded as quite tentative, pending systematic analysis of contests for intermediate appellate judgeships.

¹¹² See RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 43–62 (1980) (on vividness and perceptions of reality).

¹¹³ The classic statement was by Otto Kaus, former member of the California Supreme Court: "There's no way a judge is going to be able to ignore the political consequences of

People concerned with the selection of judges have devoted a good deal of attention to formal rules for judicial elections, in the belief that those rules have considerable effect in practice. That belief is accurate. Voters respond in different ways to partisan elections, nonpartisan elections, and retention elections. Primarily for that reason,¹¹⁴ incumbent judges are most vulnerable to defeat in partisan elections and safest in retention elections. On the whole, this means that elections pose the greatest challenge to judicial independence in states that use the partisan ballot and the most limited challenge in states with retention elections: when judges are most likely to lose, they are also most likely to lose as a result of opposition to their decisions.

But this is only a tendency. Issue-based campaigns against sitting judges are hardly unknown in retention elections. The best-known success for such a campaign—the defeat of three California Supreme Court justices in 1986—came in a retention election.¹¹⁵ It could be argued that California is anomalous because its retention elections are not part of a Missouri Plan system. But other issue-based campaigns against incumbents, such as the successful campaigns against supreme court justices in Nebraska and Tennessee in 1996¹¹⁶ and the nearly successful campaigns against Florida justices in 1990 and 1992,¹¹⁷ came in Missouri Plan states. In this respect, as in others, the Missouri Plan is not immune to “politics” in its colloquial sense.¹¹⁸

Some people, including most judges, have a general and consistent commitment to judicial independence. Beyond this base of support, judicial independence is now of greatest concern to political liberals, because it is chiefly

certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.” Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 52, 58.

¹¹⁴ Election rules also shape the behavior of prospective candidates, political parties, and others who are interested in the outcomes of judicial elections. In turn, some of these effects, such as the more substantial role of party organizations in partisan elections, help determine election outcomes for incumbents.

¹¹⁵ See *supra* text accompanying note 100.

¹¹⁶ See Reid, *supra* note 100.

¹¹⁷ See *supra* note 104.

¹¹⁸ The actual operation of the prior stages of the Missouri Plan (commission nomination and gubernatorial selection) has been documented only to a limited degree, and there is disagreement about how large a role politics plays in these stages. See generally ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* (1974); RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* (1969); Steven L. Willborn, *Off the Mark: The Nebraska Supreme Court and Judicial Nominating Commissions*, 70 NEB. L. REV. 277 (1991); Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 49–56 (1994) (discussing politics in the nominating stage).

judges perceived as liberal who are vulnerable to defeat by organized opposition.¹¹⁹ It appears that conservative groups have an advantage in spending money on judicial campaigns because of their business base, though labor unions and trial lawyers also can raise substantial funds. The most powerful advantage for conservative groups is not money; rather, the policy issue most likely to sway voters, criminal justice, is one that favors conservatives. This means that the impact of electoral pressures on judicial decisions, whatever the strength of that impact may be, is primarily in favor of conservative positions on criminal justice.¹²⁰

There is widespread dissatisfaction today with the operation of judicial elections. This dissatisfaction is based largely on perceived threats to judicial independence, though other considerations come into play. Choices about proposed changes in the structure of election rules depend heavily on the values of those who make those choices. Perhaps most important is an individual's view of the appropriate balance between independence and accountability for judges. But whatever one's values may be, assessment of proposed changes must take into account the voter's perspective. Ultimately it is voters who determine the outcomes and impact of judicial elections, and reforms based on an inaccurate conception of voting in judicial contests are unlikely to achieve their intended effects.

¹¹⁹ Conservative judges are sometimes challenged on the basis of their policy positions, usually on economic issues. One example is the well-funded campaigns against three Michigan Supreme Court justices in 2000. See Amy Lane, *Business-Backed Issues Define State Court Races*, CRAIN'S DETROIT BUS., Oct. 23, 2000, at 36; Irwin, *supra* note 106.

¹²⁰ The effects of political pressures on death penalty decisions are analyzed in John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117 (1987); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485 (1995). The argument that these pressures have a strong impact is presented in Stephen B. Bright, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123 (1999); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

